In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1226

J. D. MALLON AND CHELLIE MALLON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In March 1960, the United States condemned specified interests in approximately 3,595 acres, which included the fee title to 1,139 acres owned by petitioners, for use in the Black Butte Dam and Reservoir Project, in Tehama and Glenn Counties, California. Jury trial to determine just compensation in October 1964 resulted in a verdict of $155,000. Judgment was entered thereon on October 31, 1964, and petitioners' timely motions for new trial, to vacate the verdict and to amend the judgment were denied on March 15, 1965.

Petitioners received notice of the order denying their motions from the district court clerk on March 29, 1965, and thereupon computed the time limits for

261-833—67

appeal (Pet. 3; Pet. App. iii–iv). On the last day for timely filing (Friday, May 14, 1965), petitioners, through their counsel—who knew that it must be actually filed on that day (see Pet. App. v)—mailed a notice of appeal which, in due course, was received and filed by the district court clerk on Monday, May 17, 1965.

After briefing and argument by the parties on the merits, the court of appeals dismissed the appeal as not timely filed, adding (Pet. App. i): "However, we wish to state that we are satisfied from an examination of the briefs and record that no reversible error occurred."

There is no warrant for review by this Court of the determination that the notice of appeal was not timely filed. Unlike the situation in *Wolfsohn* v. *Hankin,* 376 U.S. 203, *Thompson* v. *I.N.S.,* 375 U.S. 384, and *Harris Lines* v. *Cherry Meat Packers,* 371 U.S. 215, there was here no reliance on action by the trial court or by an adversary at a time when a timely notice of appeal could have been filed.[1] Moreover,

[1] Petitioners' reliance on Rule 73(a)(2) is misplaced, since no action was taken under that Rule within the 30-day period. Moreover, it should be noted that the present provision of the Rule, *viz.*, "upon a showing of excusable neglect the district court in any action may extend the time for filing the notice of appeal not exceeding 30 days from the expiration of the original time herein prescribed," did not become effective until July 1966. That part of the Rule in effect in May 1965 provided "except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed." Petitioners admit they learned of the judgment in March 1965.

here—as was not true in cited cases—the court of appeals, in addition to deciding that the notice of appeal was not timely filed, accorded petitioners a full briefing and hearing on the merits and concluded, after "examination of the briefs and record that no reversible error occurred."

Since petitioners received notice of the denial order on March 29, 1965 (14 days after its entry), there is no basis for their claim that the district court clerk failed to give notice and that Rule 77(d) and *Hill* v. *Hawes,* 320 U.S. 520, are somehow involved. In any event, "Rule 77(d) has been amended to avoid such situations as the one arising in *Hill* v. *Hawes* * * *." Notes of Advisory Committee on 1946 Amendments to Rules.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967